Mohd Salleh bin MK Mohd Yusof v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K–09–56 OF 1996
ABDUL AZIZ MOHAMAD, ARIFIN ZAKARIA AND NIK HASHIM JJCA
26 MARCH 2005

Criminal Procedure — Appeal — Conviction, against — Accused convicted of raping two under-age women — Proof of age of victim — Proof by means of photocopy of birth certificate and a photocopy of identity card — Whether admissible — Evidence Act 1950 s 76

Criminal Procedure — Sentence — Enhancement of sentence — Rape — High Court enhanced sentence — Discretion of court — Circumstance of case — Whether enhancement justified — Relevant considerations

The appellant was convicted by the sessions court for two offences of raping two under-age women and was sentenced to imprisonment of five years and a half for each offence, the terms to run concurrently. The offence was punishable with imprisonment of not less than five years and not more than 20 and was also punishable with whipping. The appellant appealed to the High Court against conviction and sentence and the Public Prosecutor appealed against the sentence, deeming it inadequate. The appellant's appeal to the High Court was dismissed and the Public Prosecutor's appeal was allowed and the sentence was enhanced to ten years' imprisonment and three strokes of whipping for each offence, the terms of imprisonment to run consecutively.

The appellant appealed to the Court of Appeal against the decision of the High Court. As regards conviction, the appellant raised only one issue, which was proof of the age of the two women at the date of the alleged offences, ie there was no proof of the age of the women were under 16. It was the appellant's contention that the prosecution had sought to prove the age of the two women by means of a photocopy of birth certificate and a photocopy of identity card, but the photocopies were not admissible as certified true copies under s 76 of the Evidence Act 1950 ('the Act').

Held, dismissing the appeal on conviction and allowing the appeal on sentence:

(1) The court was satisfied that what was actually produced in court were the actual birth certificate and identity card, but what were retained as part of the court records were the certified photocopies thereof, the original having been returned. The prosecution, therefore, had relied on the evidence of the actual birth certificate and identity card for the dates of birth and therefore it did not matter that the photocopies that were kept in the court records were not properly certified as required by s 76 of the Act. The appellant failed in his only point against conviction,

therefore the court dismissed the appeal as regards to the conviction for each of the two offences (see para 5).

(2) The High Court should regard the protection of public interest as the dominant factor in cases of this nature. What the High Court took into consideration was the nature of the offence, the age of the women, and public interest. Those three factors must be weighed against the fact that the legislature, by providing a minimum sentence of five years and a maximum of 20 years, recognised the need for punishment to be meted out as was merited by the circumstances (see para 12).

(3) The factor of 'nature of the offence', if by those words was meant the type of offence, was a neutral factor because for an offence of this nature, that was rape in the form of sexual intercourse with an under-age woman, the sentence may be anything between the minimum and the maximum (see para 12).

(4) Age was not an aggravating factor in this case. For the sexual intercourse to constitute the crime of rape it was necessary in the first place that the women were under sixteen. If they had been sixteen it would not have been an offence at all. The women in this case were not far from sixteen. Age would have been an aggravating factor for sentencing if the girls had been ten years old (see para 12).

(5) As to public interest, what the High Court Judge probably meant was that the sentence ought to be severe enough to serve as a deterrent to curb the frequency of sexual exploitation of young girls. But the public interest in curbing the rampancy of a crime must be weighed against the equally important public interest in having sentences meted out that fit the circumstances of the crime. Where the court is given the power to pass a sentence within a prescribed range, the court, while taking note of public clamour, must not allow itself to be carried away by it into forgetting the importance of weighing the penalty to be imposed against the circumstances of the offence (see para 13).

(6) As to the act of sexual intercourse, nothing aggravating such as violence or resistance was mentioned. That was consistent with the evidence of an independent eye-witness (see para 16).

(7) The High Court judge, in increasing the term of imprisonment for each of the offences from five years and a half to ten years, took into account factors that, in themselves or in the light of the facts and circumstances of this case, did not justify the enhancement (see para 27).

[**Bahasa Malaysia summary**

Perayu telah disabitkan di mahkamah seksyen untuk dua kesalahan merogol dua wanita bawah umur dan dihukum penjara lima setengah tahun untuk

setiap kesalahan, penghukuman berjalan serentak. Kesalahan itu adalah kesalahan yang boleh dihukum penjara tidak kurang daripada lima tahun dan tidak lebih daripada 20 tahun serta sebatan. Perayu merayu kepada Mahkamah Tinggi terhahap penghukuman dan sabitannya dan Pendakwa Raya merayu terhadap penghukuman itu, mengatakan ia tidak mencukupi. Perayuan perayu kepada Mahkamah Tinggi telah ditolak dan rayuan Pendakwa Raya dibenarkan dan ditambah kepada 10 tahun penjara dan tiga kali sebat untuk setiap kesalahan, penghukuman berjalan serentak.

Perayu merayu ke Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi. Merujuk kepada sabitan itu, perayu membangkitkan satu isu sahaja, iaitu bukti umur kedua-dua wanita itu berumur bawah 16 tahun. Ia adalah penyataan perayu bahawa pihak pendakwa telah membuktikan umur kedua-dua wanita itu melalui salinan fotokopi sijil beranak dan kad pengenalan, tetapi salinan fotokopi tidak boleh diterima sebagai salinan benar yang diakui sah di bawah s 76 Akta Keterangan 1950 ('Akta itu').

Diputuskan, menolak rayuan terhadap sabitan dan membenarkan rayuan terhadap penghukuman:

(1) Mahkamah berpuas hati bahawa apa yang dikemukakan di mahkamah merupakan sijil kelahiran dan kad pengenalan yang benar, tetapi apa yang disimpan sebagai rekod mahkamah merupakan salinan yang telah diakui benar, salinan benar telah dipulangkan. Oleh itu pendakwa telah bergantung kepada keterangan sijil kelahiran dan kad pengenalan yang benar untuk mendapatkan tarikh lahir dan oleh itu, ia tidak penting sama ada salinan fotokopi yang disimpan sebagai rekod mahkamah telah diakui benar menurut s 76 Akta itu. Perayu gagal dalam satu-satu bantahannya terhadap sabitan dan oleh itu, mahkamah menolak rayuan terhadap sabitan atas kedua-dua kesalahan itu (lihat perenggan 5).

(2) Mahkamah Tinggi sepatutnya menganggap perlindungan kepentingan awam sebagai faktor dominan dalam kes-kes seperti ini pada masa hadapan. Mahkamah telah mempertimbangkan sifat kesalahan tersebut, usia kedua-dua wanita itu dan kepentingan awam. Ketiga-tiga faktor ini mesti diukur-beratkan terhadap faktor yang dipertimbangkan oleh badan perundangan, dengan memberikan penghukuman minimum selama lima tahun dan maksimum selama 20 tahun di mana mengiktirafkan keperluan untuk penghukuman diberikan atas merit kes dalam situasi kes itu (lihat perenggan 12).

(3) Faktor 'sifat kesalahan', sekiranya mengikut perkataan-perkataan itu bermaksud jenis kesalahan, adalah faktor yang neutral kerana bagi satu kesalahan bersifat seperti ini, iaitu rogol dalam maksud melakukan persetubuhan dengan seorang wanita di bawah umur, apa-apa penghukuman boleh dijatuhkan asalkan dalam lingkungan minimum dan maksimum (lihat perenggan 12).

(4) Usia bukan merupakan satu faktor memburukkan dalam kes ini. Untuk persetubuhan berjumlah kepada rogol, pertamanya wanita–wanita itu seharusnya berusia di bawah 16 tahun. Sekiranya mereka berusia 16, ia bukan satu kesalahan sama sekali. Wanita-wanita dalam kes ini tidak jauh dari 16 tahun. Usia menjadi satu faktor memburukkan sekiranya wanita-wanita itu berusia 10 tahun (lihat perenggan 12).

(5) Mengenai kepentingan awam, apa yang mungkin dimaksudkan oleh hakim Mahkamah Tinggi adalah bahawa penghukuman sepatutnya serius untuk mencegah kekerapan eksploitasi seks ke atas wanita-wanita muda. Tetapi kepentingan awam dalam mencegah kekerapan jenayah hendaklah diukur-beratkan secara setara terhadap kepentingan awam dalam memberikan penghukuman yang sewajar dengan situasi jenayah itu. Di mana mahkamah diberi kuasa untuk memberi penghukuman dalam lingkungan yang sedia ada, mahkamah, semasa menitikberatkan suara desakan orang-orang awam, tidak boleh melupakan kepentingan mengukur-beratkan hukuman yang diberi terhadap situasi jenayah (lihat perenggan 13)

(6) Mengenai perbuatan persetubuhan, tiada apa yang memburukkan seperti kelakuan ganas atau penentangan dinyatakan. Ini adalah konsisten dengan keterangan seorang saksi bebas (lihat perenggan 16).

(7) Hakim Mahkamah Tinggi, dalam penambahan penghukuman untuk setiap kesalahan itu daripada lima setengah tahun ke 10 tahun, telah mengambil kira faktor-faktor, secara berasingan atau bersama fakta-fakta dan situasi kes yang tidak memberi alasan untuk penambahan itu (lihat perenggan 27).]

Notes

For cases on appeals against conviction, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 232–248.

Cases referred to

Jamaluddin bin Hashim v PP [1999] 4 MLJ 1 (refd)
Pendakwa Raya lwn Abdul Rahman bin Md Kassim [1995] MLJU 210 (refd)

Legislation referred to

Evidence Act 1950 s 76
National Registration Regulations 1990 reg 5, (2), (2A), First Schedule
Penal Code s 375(f)

Appeal from: Criminal Appeal No 42–4 of 1993 (High Court, Alor Star)

Karpal Singh (Jagdeep Singh Deo with him) (Karpal Singh & Co) for the appellant.
Abdul Wahab Mohamed (Deputy Public Prosecutor) (Attorney General's Chambers) for the respondent.

Abdul Aziz Mohamad JCA (delivering judgment of the court):

[1] The appellant, on 1 February 1993, was convicted by the sessions court at Yan, Kedah, of two offences of raping two under-age women on 3 Mei 1990 and was sentenced to imprisonment of five years and a half for each offence, the terms to run concurrently. The appellant was 36 years old on the date of the offence and 38 or 39 years old when he was convicted. One of the women, whom we shall call N, was, according to the charge, aged 15 years one month at the date of the offence, and the other, whom we shall call F, was according to the charge, aged 14 years seven months at the date of the offence. The women — for such they were in law, although actually girls — being under 16 years, according to s 375(f) of the Penal Code sexual intercourse with them was rape even with their consent. Absence of consent was irrelevant for proving the offence, and the prosecution did not have to prove absence of consent to secure a conviction. On the date of the offence, as at present, rape (including sexual intercourse with a woman under 16) was punishable with imprisonment of not less than five years and not more than 20 years and was also punishable with whipping. The minimum imprisonment of five years was introduced on 5 May 1989.

[2] The appellant appealed to the High Court against conviction and sentence and the Public Prosecutor appealed against the sentence, deeming it inadequate. On 26 September 1996 the appellant's appeal was dismissed and the Public Prosecutor's appeal was allowed and the sentence was enhanced to 10 years' imprisonment and three strokes of whipping for each offence, the terms of imprisonment to run consecutively. The appellant appealed to this court against the whole of the decision of the High Court. We heard the appeal on 30 June 2004.

[3] The appellant has been on bail since his conviction in the sessions court.

[4] As regards conviction, the appellant's counsel, En Karpal Singh, raised only one issue, which was as to proof of the age of the two women at the date of the alleged offences. His point was that there was no proof of the age of the women as being under 16. This issue was not raised in the High Court and neither was there a challenge as to age in the trial. Counsel's first reason for his contention is that the prosecution sought to prove the age of N by means of a photocopy of her birth certificate and that of F by means of a photocopy of her identity card, but the photocopies were not admissible as certified true copies under s 76 of the Evidence Act 1950 because the certification of their being true copies was not done by the proper officer, but by a police inspector, and was not dated. His second reason concerns only F, and it is that an identity card is no proof of the age of its holder.

[5] To deal with the first reason, it is necessary to set out the scraps of evidence relating to the birth certificate and identity card in the sequence in

which they were given. At p 35B of the trial notes, N, after stating her age as fifteen at the date of the offence, identified a document as her birth certificate. It was marked for identification as ID3, the number being stated to be for a birth certificate. At p 53A of the notes, Inspector Sandra Lowe said, 'Saya telah buat salinan surat beranak dan kad pengenalan, Ya ini dokumen yang dimaksudkan. Asal telah dikembalikan'. Shortly after, at p 53 B–C, she identified an identity card as that of F. This was tendered as exh P7, which is stated in the notes to be F's identity card. At p 56B Inspector Thamarai Letchumi said, 'Saya dapatkan salinan sijil beranak daripada mangsa. Inilah dokumen tersebut'. There follows a note stating that the birth certificate, that of N, which had been numbered for identification as ID3, now became exh P3. At p 65D, F identified exh P7 as her identity card. Then follows the notes: 'Original dikembalikan. PO akan kemukakan salinan'. From the copies in the appeal record it would appear that the documents that were eventually marked P3 and P7 and kept by the sessions court were respectively the certified photocopies of the birth certificate of N and identity card of F. From those scraps of evidence we are satisfied that what were actually produced in court were the actual birth certificate and identity card, but what were retained as part of the court records were the certified photocopies thereof, the original having been returned. The prosecution, therefore, had relied on the evidence of the actual birth certificate and identity card for the dates of birth and therefore, in our opinion, it does not matter that the photocopies that were kept in the court records were not properly certified as required by s 76 of the Evidence Act 1950. We would mention that according to the birth certificate N's date of birth was 15 March 1975 and according to the identity card F's date of birth was 8 October 1975.

[6] In contending that an identity card is no acceptable proof of a person's date of birth, En Karpal Singh relied on the decision of the High Court in *Jamaluddin bin Hashim v Public Prosecutor* [1999] 4 MLJ 1 where, on appeal, the conviction and sentence of the appellant for the rape of a woman allegedly under 16 years of age were set aside on the ground that the identity card of the woman concerned, on which the prosecution had relied for the required proof, could not in law be used to prove her age or date of birth. The prosecution's appeal to this court (Criminal Appeal No K–09–28 of 1999) was dismissed, which means that this court agreed with the High Court's judgement in that case as to proof of age by identity card.

[7] Reading the High Court judgement in that case, it is apparent that the identity card of the woman in that case was one issued under the National Registration Regulations 1990, the First Schedule to which prescribes the form of an identity card and the particulars that it must contain, which do not include the holder's date of birth. Accordingly the identity card of the woman in that case did not bear an entry described as the woman's date of birth. It must have contained a number which the First Schedule prescribes as the identity

card number. It had been common knowledge that the first six digits of that number were meant to represent the date of birth of the holder but the judge did not take them into account, presumably because in law, that is according to the First Schedule, the whole number was the identity card number and the date of birth was not required to be given. So he found that the date of birth was not given in the identity card. It is only by an amendment in 2001 [PU(A) 232/01], after *Jamauddin*, that it is stated as a matter of law that the first six digits represent the date of birth. That is to be seen in para (2A) of reg 5 of the 1990 Regulations.

[8] But the identity card of F in this case was an old-form identity card issued on 28 October 1987, before the National Registration Regulations 1990 came into being. It was issued under the National Registration Regulations 1960, which were repealed by the 1990 Regulations and which did require the date of birth to be included in identity cards issued under them. See reg 5(2) and the Form of Identity Card in the First Schedule. Accordingly the card did give the date of birth of If the identity card in the case of *Jamaluddin* had been of the same kind, the decision in the case might well have gone a different way. In any case, if it was, in that event, to be submitted that the identity card could not be accepted as proof of date of birth, the submission would have to be supported by reasons entirely different from those that were actually given by the judge.

[9] The decision in *Jamaluddin* was therefore an entirely wrong basis on which to argue against the acceptability of the identity card in this case as proof of the date of birth of F. En Karpal Singh did not seem to realise the difference between the identity card in *Jamaluddin* and that in this case. Neither did we, when we heard the appeal. Neither presumably did the DPP. Had En Karpal Singh realised it and still wished to urge us not to accept the identity card in this case as *prima facie* proof of date of birth, he would have had to come up with reasons different from those furnished by the case of *Jamaluddin*, which reasons we reject as inapplicable to the present case. The question would have been whether an identity card issued under the 1960 regulations and bearing the date of birth as required by the regulations furnishes legal proof of the date of birth of the person concerned. That question has not been argued before us and we refrain from answering it. We would treat the question as not having been raised before us in this appeal and we would therefore regard the admissibility of F's identity card as proof of her age, which as we said was not an issue in the courts below, as not an issue before us.

[10] Since the appellant fails in his only point against conviction, we dismiss the appeal as regards conviction for each of the two offences.

[11] We come now to the sentence. En Karpal Singh's submission was directed against the increase by the High Court of the term of imprisonment for each of the offences from five years and a half to 10 years. He did not

submit against the consecutiveness of the two terms. He accepted it as justified by the authorities. He did not submit against the sentence of whipping, presumably because the appellant had attained the age of 50, and the sentence could therefore no longer be executed upon him. The gist of En Karpal Singh's submission as regards the length of imprisonment was that, in imposing a term of five years and a half, the sessions court judge must have considered all the factors that ought to be considered, including circumstances of the case that were in favour of the appellant, and that, therefore, the term was fair and ought not to have been enhanced.

[12] The sessions court judge had said that in passing sentence she took the appellant's pleas in mitigation into consideration. Among the pleas were that he was a first offender and no violence was used. In the High Court the DPP had submitted that the imprisonment for each offence should at least be 10 years. The appellant's counsel, according to the appeal notes, had mentioned something about the loose character of the two women. The appellate judge considered that imprisonment of five and a half years was 'manifestly inadequate'. He said, 'Bearing in mind the nature of the offence, the age of the victims and the frequency of crime of rape involving minors nowadays, I think the appellant deserves a more serious sentence. The [court] should regard the protection of public interest as the dominant factor in cases of this nature: *Pendakwa Raya lwn Abdul Rahman bin Md Kassim* [1995] MLJU 210'. So what the judge took into consideration were the nature of the offence, the age of the women, and public interest. Those three factors must be weighed against the fact that the legislature, by providing a minimum sentence of five years and a maximum of twenty years, recognised the need for punishment to be meted out as is merited by the circumstances. The factor of 'nature of the offence', if by those words was meant the type of offence, is a neutral factor because for an offence of this nature, that is rape in the form of sexual intercourse with an under-age woman, the sentence may be anything between the minimum and the maximum. As to age, that is not an aggravating factor in this case. For the sexual intercourse to constitute the crime of rape it was necessary in the first place that the women be under 16. If they had been 16 it would not have been an offence at all. The women in this case were not far from 16. Age would have been an aggravating factor for sentencing if the girls had been, say, 10 years old.

[13] As to public interest, what the judge probably meant was that the sentence ought to be severe enough to serve as a deterrent to curb the frequency of sexual exploitation of young girls. But the public interest in curbing the rampancy of a crime must be weighed against the equally important public interest in having sentences meted out that fit the circumstances of the crime. Where the court is given the power to pass a sentence within a prescribed range, the court, while taking note of public clamour, must not allow itself to be carried away by it into forgetting the importance of weighing the penalty to be imposed against the circumstances of the offence. Let us illustrate the

point by giving three hypothetical instances of sexual intercourse with an under-age woman. The first is sexual intercourse on a commercial basis with a professional sex provider of fifteen. The second is sexual intercourse in an unguarded moment between a young man and a girl of fifteen and a half who are fast and long-standing lovers. The third is sexual intercourse between a middle-aged man and a naive and helpless girl of eight. All the three instances are by definition and classification crimes of rape. But no matter how concerned society is about the prevalence of sexual intercourse with young girls, surely the first and second instances do not deserve a punishment as severe as the third case deserves.

[14] It is pertinent to note that the case of *Pendakwa Raya lwn Abdul Rahman bin Md Kassim* [1995] MLJU 210 that the learned appellate judge cited was a case of rape in which he himself, on appeal, increased the sentence from six years and five strokes to 12 years and six strokes, but that was a rape committed on 22 October 1990 by a man of 27 on a girl of eight in a hut in a wooded area, as a result of which the girl suffered serious genital injuries.

[15] It may be that the judge did take into consideration the circumstances in this case and it may be that when he mentioned 'the nature of the offence' he was referring to the circumstances. The circumstances that he would have taken into account would have been the circumstances that he himself set out in his judgement. These are set out in the following passage:

> The facts of the case, as presented by the prosecution, are well set out in the grounds of judgment of the learned sessions court judge. To restate them briefly, the appellant met and befriended these two girls at a popular bazaar in Alor Setar known as Pekan Rabu. These two girls were there with a lady friend of theirs. The appellant, pretending to be a film producer, invited the three of them to go with him in his van to a popular picnic area near Yan known as Batu Hampar. On the way, in the course of conversation with the lady and the girls, he claimed that he was a bomoh and was able to convince the three that they were 'cursed' and that he could help them get rid of the curse (tolak sial). Along the journey, he stopped the van at the town of Guar Chempedak and asked the three persons to get down and buy some limes which he claimed he would need for the purpose of removing the curse. On arrival at Batu Hampar, he took them to a pool near a waterfall; and at this spot, under the pretext of bathing and 'curing' them, he took undue advantage of his gullible victims, one at a time. First, he indulged in oral sex with the lady, thereafter he had sexual intercourse with the two girls.

[16] As to the act of sexual intercourse, nothing aggravating such as violence or resistance was mentioned. So to the judge it may be assumed that there was nothing aggravating about the act of sexual intercourse itself, as otherwise he would have mentioned it. That is consistent with the evidence of an independent eye-witness, a man who had gone fo the place in search of *petai* and who watched the sexual intercourse with the two women from first to last. The evidence of this witness was that the sexual intercourse was achieved without

any difficulty or resistance except that during the intercourse F cried out, but according to this man it was a cry of pain, not a cry for help. The pain must have been vaginal pain, which would not be unusual in a hasty sexual intercourse between a virile man and a young girl, even one grown up, who, as F claimed about herself, has not experienced sexual intercourse before.

[17] A circumstance leading to the intercourse that the judge mentioned would be a relevant circumstance if true. He said that the appellant took undue advantage of his 'gullible victims' by the pretext of curing. It implies that to the judge the two women consented to sexual intercourse under the belief that it was part of the cure. It raises the question whether the two women actually believed that sexual intercourse was part of the cure. That question did not arise in the trial and the women were not specifically cross-examined with a view to establishing the answer to the question, and that obviously was because the primary issue in the case was simply whether sexual intercourse took place and the defence was concerned to establish that there was no sexual intercourse. We find it difficult to accept as a general proposition that a girl of 14 or 15 would believe that sexual intercourse with a bomoh would cure her of her *sial*, but apart from the inherent improbability of such a proposition, there is evidence that points to the probability that the two girls knew that sexual intercourse was not part of the treatment.

[18] The evidence is that in the pool the three women had already been subjected to treatment that N and F said they believed was the curing process. The 'lady friend' was a woman of 22, whom I shall refer to as R. The order of treatment was, first, R, then N, and finally F.The appellant had rubbed N's and F's bodies, including their breasts and genitals, with portions of lemon. As for R, the appellant had, in addition, sucked her breasts and did likewise to her genitals. The intercourse took place after the appellant had left the pool and gone to higher ground where there was a boulder. At the beckoning or behest of the appellant, the three women had gone up to him by turns, first R, then N, and finally F. The *petai* man said that the appellant and each woman conversed for a few minutes before she lay herself down on the boulder. Even in examination-in-chief, the evidence of N was this: 'OKT duduk di atas saya. Dia juga sapu. OKT duduk di atas saya, saya menolak dia. Kemudian OKT terus tidur atas saya. Saya tolak dengan kedua belah tangan. Mula-mula dia duduk atas paha dengan tujuan hendak masukkan kemaluan dia ke dalam kemaluan saya. Pada mula saya tidak tahu tujuan dia. Masa OKT duduk atas paha saya. Waktu itu, OKT masih pakai seluar dalam. Pada masa itu masih dalam proses mengubat dan diteruskan dari buah dada. Dia hendak buka seluar dalam saya. Sampai di peringkat menyapu itu proses mengubat telah habis. OKT buka seluar dalam dia dan hendak masuk kemaluan dia ke dalam kemaluan saya. Saya menolak dia tetapi saya tidak berdaya menolak. Saya tidak ingat berapa kali saya menolak Dua kali saya cuba menolak dia. Saya tolak dengan kuat'. A little while later she said, 'Saya tidak setuju dengan cara OKT berubat begitu kerana itu cara yang tidak elok.

[19] As for F, speaking about the treatment in the pool, she said in examination-in-chief, 'Di peringkat itu saya tidak buat apa-apa kerana saya sangka ia semua perbuatan biasa untuk ubat saya'. When it came to the happening at the boulder she said, 'OKT suruh saya duduk di atas batu, dia suruh saya baring di atas batu. Saya baring untuk membolehkan OKT berubat. Kaki lurus dan tangan biasa. OKT terus menyelak kain saya. Tiada buah limau masa itu. Dia menyelak kain sehingga pinggang, Dia terus naik ke atas badan saya. Saya cuba menolak dengan tangan. Kedua belah tangan. Saya tidak berdaya. Saya masih pakai baju itu. Dia membuka seluar dia. Dia tidur atas saya. Tangan dia diguna untuk buka seluar dia. Dia guna sebelah tangan. Dia londeh seluar dia tetapi saya tidak ingat sehingga mana. Saya menjerit Saya menjerit minta tolong. Saya takut. Saya jerit tetapi tidak kata apa-apa. Saya jerit kuat dengan suara yang tinggi. Saya jerit dua kali'. Then a little further on she said, 'Tiada proses pengubatan selain daripada merogol saya semasa itu. Kalau saya tau dia akan buat begitu saya tidak akan ikut dia'. In re-examination she said, 'Pada hari itu, saya mula-mula lawan balik semasa dia naik atas badan saya. Saya lawan kerana saya tidak suka dia buat macam itu. Apa dia buat demikian, saya terbayang yang dia hendak buat yang tidak baik. Sebelum itu tindakan dia saya restui kerana saya sangka dia buat baik iaitu mengubat kita'.

[20] What may be understood from the evidence of N and F that has been set out is that to them the process of curing was only to the extent of rubbing their bodies with lime portions and that when the appellant wanted to proceed beyond that they resisted. Although, unlike N, F said that at the stage on the boulder no lime portions were used, the evidence of the *petai* man was that before the intercourse the appellant kneaded the breasts of each of them with lime portions and sucked the breasts. As to their saying that they attempted to resist sexual intercourse, the *petai* man, as we said, said that there was no resistance whatever and that the appellant achieved sexual intercourse without any difficulty, and the judge, as we said, did not make any mention of resistance on their part. For sentencing, the appellant must be given benefit of the independent evidence of the *petai* man, but the fact that they claimed in evidence that they attempted to resist the appellant when it came to sexual intercourse reveals a state of mind existing at the trial, and which could well be reflective of a state of mind existing at the time of the incident, that rejected sexual intercourse as part of the cure, and complements the fact, as may be understood from their evidence, that to them the cure was only to the extent of lime rubs. It is therefore not safe for sentencing purposes to proceed on the supposition that the appellant achieved sexual intercourse with them by making them believe that it was part of the cure. The probability cannot be discounted that they consented to sexual intercourse knowing that it was not part of the cure.

[21] In fact there were circumstances which are consistent with its being not improbable that, at that period in their lives, the two women were of a

kind that, given the right excuse, inducement or stimulus, would not be averse to indulging in illicit sexual intercourse. The circumstances tend to support the description given them by the appellant's counsel in the High Court as women of loose character. There is the circumstance that R, the 'lady friend' of 22, had arranged with N the previous night to meet in Alor Setar to go rambling or sight-seeing ('bersiar-siar') in the town, and on the morning in question N had left her home without telling her father and carrying a bag of clothes for which she gave the vague reason that she feared her dress would get soiled and she could sleep ('kerana takut baju akan jadi kotor dan saya boleh tidur'). As to F, she was on her way back to her kampung from her grandmother's house in Kepala Batas when she decided to stop in Alor Setar, also to 'bersiar-siar'. Then there is the circumstance that the three of them willingly agreed to go with the appellant in his van after the appellant, a complete stranger, asked them to show him scenic places. The question arises as to what actually motivated them to follow the appellant. It is not probable that it was in order to do him the favour of showing him scenic spots. It is not probable that they believed that the appellant actually needed a guide or needed them, of all people, to be his guide. It is probable that they knew that it was only the appellant's excuse to have them with him and that therefore they went with him for the thrill of it. Then there is the fact that, in connection with the appellant's dubbing of them in the van as *sial*-infected women, N admitted in evidence that she had many men friends and that she liked to ramble around and did not like to stay at home, and both N and F admitted in evidence that they had a bad reputation in their community in that respect.

[22] To crown it all there is the fact that when N and F lodged their reports against the appellant, they also lodged rape reports against two other men. After the incident at Batu Hampar on 3 May 1990, N and F, so they said, did not return to their homes in Kota Sarang Semut in Alor Setar, but went to live with a friend and her family in Kuala Nerang. The incident at Batu Hampar had been interrupted and brought to an end when the *petai* man made his appearance while the appellant was having sexual intercourse with F. This man's advent led to the matter coming to the knowledge of two policemen who happened to be on their rounds near the place at the time. As a result, the three women and the appellant ended up at the Yan police station on 3May 1990, but N and F, on the advice of R and also out of fear of their fathers' anger, decided not to lodge a report. It was when they were staying in Kuala Nerang that they lodged their reports, and that was done in Alor Setar, because there was no woman police officer to attend to them in Kuala Nerang. It was on 6 May 1990. The separate reports of N and F against the appellant, although made in Alor Setar, were registered as Yan reports, presumably because the incident took place in Yan District. F's report, Yan 274/90, was made at 12.25pm N's report, Yan 275/90, was made at 12.30pm. At 1pm F made her other rape report. At 1.15pm N made her other rape report. These reports were registered as Kuala Nerang reports presumably because the

alleged rapes were said or thought to have taken place in Kuala Nerang. F's report was Kuala Nerang 450/90. N's was Kuala Nerang 451/90. Both men were arrested but were subsequently released. N said she withdrew her report. N and F ended up getting married to the respective men. The making of these other reports only came out in the cross-examination of the two women and the two police officers, Inspector Sandra Lowe and Inspector Thamarai Letchumi, who had taken them down. There was hardly any oral evidence as to what actually happened in the alleged incident involving these two other men, and the two Kuala Nerang reports, although tendered as exhibits, are not in the appeal record and were therefore not before us when we heard the appeal. Copies of them have, however, been obtained subsequently.

[23] In her report, F said that at 8pm on 3 May 1990 — the day of the incident at Batu Hampar — while she and N were walking in a narrow lane, two men trailed them and sought to be acquainted with them. F and N agreed after the men invited them to a meal. After the meal they went and watched a movie at a cinema. After that they all went to an unoccupied and locked house in Alor Setar and stayed on the verandah. On the evening of the following day, 4 May, they went to an empty hut in a sugar-cane plantation in Kuala Nerang, where at 12.30am on 5 May, one of the men 'raped' her once. It may be mentioned that in cross-examination F said that the man did not rape her in a rough manner, and that she could not remember how many times he raped her, from which it may be inferred that F had sexual intercourse with the man more than once.

[24] N, in her report, said that R, the 'lady friend', was with her and F when the two men approached them, but R refused to go along. N said that at the unoccupied house in Alor Setar they all sat talking until 4am of the following day, 4 May, when the other man asked her to go with him to the verandah, where he pushed her to the floor and 'raped' her. In the empty hut in Kuala Nerang, he again 'raped' her at 10pm.

[25] Both F and N in their reports said that at 10pm on 5 May the police came and brought them from the hut to the police station in Kuala Nerang.

[26] The two Kuala Nerang reports, and F's answer in cross-examination, show that soon after the incident at Batu Hampar, the two girls followed other strange men in the night to strange places and indulged in sexual intercourse with them. It did not require the prospect of a cure for sial to induce them to sexual intercourse — just a meal, a picture show, and the right place and time.

[27] For the reasons that we have stated and bearing in mind the matters that we have set out, we are of the view that the learned judge, in increasing the term of imprisonment for each of the offences from five years and a half to 10 years, took into account factors that, in themselves or in the light of the facts and circumstances of this case, do not justify the enhancement. We accordingly

allow the appeal against sentence to the extent of setting aside the terms of imprisonment imposed by the High Court and affirming those imposed by the sessions court, namely five and a half years for each offence. We do not disturb the order of the High Court that the terms be served consecutively. We pass no judgement on the whipping imposed by the High Court because, it being now academic, the matter was not brought within our consideration in the appeal.

Appeal on conviction dismissed. Appeal on sentence allowed.

Reported by Peter Ling